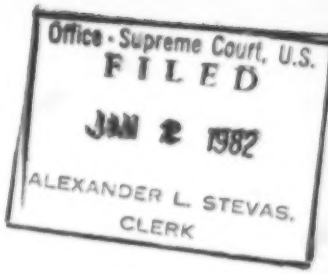
Petition

81-2074



NO. 80-1418

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

DAVID REMSING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the court of appeals err in failing to order a new trial on all counts based upon the possibility of "cross-count prejudice", where it reversed eleven counts of a thirteen-count indictment?

II. Did the court of appeals err in refusing to review one of two counts left standing, after reversal of eleven of the counts, based upon the "concurrent sentence doctrine?"

SUBJECT INDEX

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. ARGUMENT AS TO ISSUE I, CROSS-COUNT PREJUDICE	9
II. ARGUMENT AS TO ISSUE II, THE CONCURRENT SENTENCE DOCTRINE	14
CONCLUSION	15
APPENDIX	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Page

Table of Cases

United States v. Burkhart,
458 F.2d 201 (10th Cir. 1972) 11

United States v. Meriwether,
486 F.2d 498 (5th Cir. 1973) 12

United States v. Parr,
509 F.2d 1381 (5th Cir. 1975) 12

United States v. Vargas,
615 F.2d 952 (2d Cir. 1980) 14

Statutes and Rules

Title 28, United States Code, ¶1254(1) 2

Other Authorities

Donnely, Judicial Control of Informants,
60 YALE L. J. 1091, 1119 (1951) . . . 12

10 MOORE'S FEDERAL PRACTICE, ¶404.21. . 11

C. Wright, FEDERAL PRACTICE
AND PROCEDURE, C. Wright,
¶227 at 470 (1969) 12

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DAVID REMSING,
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v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, David Remsing, respectfully prays that a writ of certorari issue to review the position of the Ninth Circuit Court of Appeals affirming his felony convictions for distribution of heroin.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals affirming two counts of Petitioner's conviction and reversing eleven counts is set out as Appendix.

JURISDICTION

The decision of the Ninth Circuit in this case was handed down on November 2, 1981. This petition is filed within sixty days of that decision. Jurisdiction of this Court is evoked under Title 28, United States Code, §1254(1).

STATEMENT OF THE CASE

Six persons were charged with conspiracy to traffic in heroin and with related substantive counts. (RT 3)[1,2] Five of the six were tried jointly; the sixth was severed because of a mental competency question. (RT 43)

Most of the difficulties which arose during the trial, and the issues presented in this brief, stem from the fact that the

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[1] "RT" denotes trial transcript.

[2] Count I, the conspiracy count, alleged that all six defendants were involved in a heroin trafficking conspiracy "beginning at a time unknown, but within the last five years and continuing through on or about January 18, 1980."

government's conspiracy allegation was not proven; the conspiracy count was submitted to the jury only as to two of the five defendants. Related substantive counts

(footnote continued)

Count II charged Theodore House (the severed defendant) and Remsing with distributing heroin on September 5, 1979.

Count III charged that Theodore House, Debbie Schafer (hereinafter referred to by her married name, Debbie House) and Remsing distributed heroin on September 14, 1979.

Count IV charged that Acosta, Kaiser and Remsing distributed heroin on September 25, 1979.

Counts V, VI and VII charged that Theodore House and Debbie House traveled from Washington to Oregon and back (Counts V and VII) to acquire heroin and did possess heroin (Count VI).

Count VIII charged that Kaiser and Remsing distributed heroin on September 29, 1979.

Counts IX-XII charged that on October 16, 1979, Theodore House and Debbie House traveled from Washington to Oregon and back (Counts IX and XII) to acquire heroin, "counselled and commanded" by Remsing, that Remsing distributed heroin to them (Count X) and that the Houses' possessed that which Remsing distributed (Count XI).

Count XII charged that Remsing distributed heroin on October 30, 1979.

were dropped as well[3], all without government objection.

In its case in chief, the government called nineteen witnesses. Chief among them were the undercover agent of the Drug Enforcement Administration, Douglas Taylor, and an informant by the name of Jimmy Don Woodard. Agent Taylor's testimony was stricken early on in the trial as a result of destruction of Jencks Act material. (RT 158, 164) The sole witness to the substantive count which was upheld against petitioner Remsing was the informant Woodard. His credibility was so critical

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[3] At the close of the government's case, the trial court entered judgments of acquittal on the conspiracy count (Count I) for defendants Marlys McClury, Robert Kaiser and Ernesto Acosta. Because of that failure of proof, the court entered judgments of acquittal on substantive charges as follows:

Kaiser: Count IV [RT 489]

Remsing: Counts IV, VII [RT 521, 534]

The government did not oppose any of the acquittals which were ordered.

that the trial court observed, "This case is going to rise or fall" on his testimony. (RT 543) The informant Woodard was an admitted heroin addict who was working as an informant to avoid prosecution for selling cocaine. (RT 166) He had previously been convicted. (RT 464) He was a poly-drug abuser and had done so since 1966. (RT 462) He continued to use heroin during the investigation (RT 469), including heroin obtained as an informant from a co-defendant in this trial. (RT 470) The government was aware of all of the above, but continued to use him as an informer and relied upon his testimony as its chief witness. (RT 481)

As noted above, at the close of the government's case its proof was so insufficient that his attorney acceded to entry of the judgments of acquittal which were granted. (RT 485, 487, 489, 521) The failure of proof was in no sense due to any

adverse rulings against the government, rather the acquittals were foreseeable as a matter of fact and law. In the aftermath, in an effort to sort out the pieces, the defendant made the following motions: a co-defendant and petitioner Remsing moved for judgments of acquittal on the conspiracy count, and those substantive counts tied to it (RT 491-93, 505, 510) on the ground that there was insufficient proof of the single, grand criminal conspiracy alleged in the indictment.

The items of evidence which should have been stricken because of the acquittal were itemized for the trial court. (RT 494, 499) A motion to strike the testimony of seven of the eighteen witnesses, and the exhibits which were introduced through them, was made for the defense and the government did not oppose this motion. (RT 431-40; 499) So much was to be stricken

that a motion for mistrial was made but denied. (RT 526-29) The jury was then given inconsistent and incomplete instructions by the court as to what evidence was stricken and how the jury could view the remaining evidence.

First, the court struck only some of the evidence which all parties agreed had to be stricken (RT 537-38) and did not strike the evidence with respect to petitioner Remsing, only to a co-defendant. The court refused to review the matters which it neglected to strike and noted that it could "leave that to the Court of Appeals." (RT 541-44)

In its final instructions to the jury, the court gave inconsistent instructions which could only be confusing, given what had gone before. (RT 637-39) An instruction on vicarious liability of co-conspirators was given to the jury with respect to

all counts, however. The trial court was unwilling to take the time to sort out the evidence and deal with the problems which emerged from its order of proof. Throughout the trial, the court threatened night sessions (RT 15, 29, 126) and even warned it would declare a mistrial if the case was not finished before the court's planned departure from the city before the end of the week. (RT 274) The trial was completed within that time period, but not even a Solomon could fathom the state of admitted evidence and its application to particular defendants at the close of the trial.

As the Ninth Circuit Court of Appeals set forth in its opinion, various packets of heroin were erroneously admitted into trial, as was a tape-recorded conversation of petitioner Remsing. (Appendix, Slip Op. at p. 5494) The court of appeals affirmed the one count of distribution of narcotics

from petitioner Remsing to the informant Woodard, on the theory that petitioner Remsing was alone -- according to the informant -- the jury could not have been confused by the vicarious liability theory. (Appendix, Slip Op. at p. 5495) The court of appeals did not address this issue in upholding the second count, in which petitioner Remsing was charged as an aider and abettor and was not present during the transactions, instead relied on its concurrent sentence doctrine of affirmance. (Appendix, Slip Op. at p. 5495) The jury returned verdicts of guilty on all counts, against all co-defendants, submitted to it. (RT 134)

REASONS FOR GRANTING THE WRIT

I. Argument as to Issue I, Cross-Count Prejudice

This petition asks the Court to elucidate the doctrine of cross-count

prejudice in a case where the problem is squarely framed in a multi-defendant case. Conviction on eleven of thirteen counts was reversed by the court of appeals, while two remaining counts were left standing.

Because of the proliferation of multi-count indictments, the overwhelming possibilities of cross-count prejudice, and the absence of any Supreme Court opinion on the subject, petitioner respectfully suggests that this Court should grant certiorari to bring clarity to the doctrine in the context of the current prosecution techniques.

The petitioner respectfully suggests that the jury in his case inevitably inferred guilt on Counts XIII and X from the complex and confusing evidence of wrong doing admitted to prove the reversed counts, and that this probability required a reversal of all counts in order to assure

a fair trial, free from cross-count prejudice.

Evidence of other crimes is ordinarily excluded by Rule 404, Federal Rules of Evidence. The enormous prejudicial impact of evidence of other crimes, rather than principles of relevancy, explain this exclusionary rule. 10 Moore's Federal Practice §404.21. In fact, it is:

> an obvious truth that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality. This is true regardless of the care and caution employed by the court in instructing the jury. United States v. Burkhart, 458 F.2d 201, at 204 (10th Cir. 1972).
>
> It is obvious that as the number of counts is increased, the record becomes more complex and it is more difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind. . . . This kind of prejudice is particularly dangerous to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with

> only one or two of their co-defendants.

C. Wright, Federal Practice and Procedure, §227 at 470 (1969).

This court can judicially notice the proliferation of multi-count indictments. Yet petitioner has found no case in which the Supreme Court has considered the problem of cross-count prejudice in complex multi-count indictments, and very few in which it has been considered in the lower courts. See, e.g., United States v. Parr, 509 F.2d 1381 (5th Cir. 1975); United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973).

Petitioner does not suggest that multi-count indictments are inappropriate. He does, however, suggest that where most of the counts in such a complex indictment are reversed, and the bulk of the government's evidence deemed inadmissable, the inevitability of cross-count prejudice

requires a new trial on all counts. This is particularly true where an overall conspiracy is charged, the jury is instructed on the principles of vicarious liability and the charge later fails. The case against petitioner Remsing was finally distilled after appeal to the testimony of the informant.[4] The jury was never given the opportunity to access that case alone.

This question is made important by current prosecution techniques, and by the substantial prejudice to a fair trial with which it purports to deal.

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[4] The great temptation of an informant to "frame" has been noted:

> The informant has participated in the commission of an offense before he extends any aid to the enforcement authorities. He usually agrees to assist the prosecution in exchange for a promise of immunity of leniency. He is a confessed criminal and there is a real danger that he will falsely accuse others and give perjured testimony.

Donnely, Judicial Control of Informants, 60 Yale L. J. 1091, 1119 (1951).

II. Argument as to Issue II, the Concurrent Sentence Doctrine.

The petitioner respectfully suggests that he was prejudiced by the erroneous application of the concurrent sentence doctrine to his case by the court of appeals. This doctrine, made increasingly relevant by the proliferation of multi-count indictments, is in a state of complete confusion among the circuits. See, United States v. Vargas, 615 F.2d 952, 957 (2d Cir. 1980) (Reviewing the status of the doctrine): "[T]he Supreme Court itself has not exactly provided crystal-clear guidance on the subject." Id. at 957.[5]

The issue is squarely framed in this case since without application of the

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[5] The court, in Vargas, succinctly and accurately sets forth the split in federal circuits among the Second, Fourth, Seventh and Fifth, Eights and Ninth, as well as a discussion of this Court's approach to the doctrine. Id., at pp. 956-959. Rather than repeat its analysis, we rely on the text of that well-reasoned opinion.

doctrine the logic of the Ninth Circuit in questioning the eleven counts, because of the taint of the co-conspirator vicarious liability doctrine would compel reversal of the counts swept up in this doctrine. Because the issue has become increasingly relevant in the light of current prosecutorial trends, and because the state of the law on the subject cries out for some clarification, petitioner respectfully submits that this Court should take this oportunity and grant certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED this 15th day of April, 1981.

Respectfully submitted,

PETER K. MAIR

Appendix

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert P. KAISER, Ernesto Acosta, Deborah Lee Schafer, David R. Remsing, and Theodore House, Defendants-Appellants.

Nos. 80-1415 to 80-1418 and 80-1628.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 8, 1981.

Decided Nov. 2, 1981.

Defendants, charged with conspiracy to distribute heroin, possession with intent to distribute heroin and violations of Travel Act, were convicted before the United States District Court for the Western District of Washington, Jack E. Tanner, J., and they appealed. The Court of Appeals, East, District Judge for the District of Oregon, sitting by designation, held that: (1) proof did not vary fatally from crimes charged; (2) it was error to refuse to instruct that jury must find a

continuous course of criminal conduct to convict on the Travel Act counts; (3) once undercover agent's testimony was stricken, it was abuse of discretion to refuse to strike exhibits as to which his testimony provided necessary foundation; (4) evidentiary errors required reversal of conspiracy convictions of two defendants; (5) determination that heroin introduced at trial was in substantially the same condition as when crimes were committed was not abuse of discretion; and (6) tape recordings obtained with consent of only one party were not inadmissible on ground that they were made in violation of Washington state law prohibiting recordings absent consent of all parties or court order.

Affirmed in part, reversed in part.

1. Criminal Law -- 1134(3)

Although conspiracy convictions were reversed because of evidentiary errors,

reviewing court addressed claims of variance between proof and indictment because they were cast in the form of allegations that the evidence was insufficient and, if true, such allegations would invoke double jeopardy protections against retrial. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.C.A. Const. Amend. 5.

2. Conspiracy -- 23

Essential elements of conspiracy are agreement to accomplish an illegal objective coupled with one or more overt acts in furtherance of the illegal purpose, and the requisite intent to commit the underlying substantive offense or offenses. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

3. Criminal Law -- 1167(1)

Variance between indictment and proof does not require reversal unless it affects substantial rights.

4. Conspiracy -- 43(12)

Failure of the Government to connect one or more defendants to a charged conspiracy is not a fatal variance. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

5. Conspiracy -- 43(12)

There was no fatal variance between conspiracy indictment and proof where testimony pertaining to the three defendants acquitted on conspiracy count in no way related to or implicated remaining defendants and without some common link between the two groups of defendants there was no reason to assume that the convicted defendants' substantial rights were prejudiced by a high risk of guilt transference from the members of one group to members of another. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

6. Conspiracy -- 48.2(2)

It was not error to refuse requested multiple conspiracies instructions where there was no evidence of multiple conspiracies and, thus, no variance with regard to the number of conspiracies charged and proven, with indictment charging a single conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

7. Conspiracy -- 43(12)

There was no variance between duration of drug conspiracy charged in indictment and the conspiracy proven where indictment alleged that conspiracy began at a time unknown but "within the last five years" and continued until specified date and indictment did not allege that conspiracy had lasted an entire five years. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

8. Drugs and Narcotics -- 45

Words "business enterprise" as used in Travel Act refer to a continuous course of criminal conduct rather than sporadic or casual involvement in a proscribed activity. 18 U.S.C.A. §§ 1952, 1952(a)(3), (b)(1).

See publication Words and Phrases for other judicial constructions and definitions.

9. Commerce -- 82.5

Travel Act requires only that the business enterprise be continuous, not that the interstate travel be continuous. 18 U.S.C.A. § 1952.

10. Commerce -- 82.5

Evidence of repeated sales of heroin was sufficient to establish a continuous course of criminal conduct for purpose of Travel Act conviction and was sufficient to establish that defendants traveled across state lines four times in pursuit of their unlawful business enterprise, thus violating the Act. 18 U.S.C.A. § 1952.

11. Commerce -- 82.5

It was error to refuse to instruct that jury must find a continuous course of criminal conduct to convict defendants of the Travel Act counts. 18 U.S.C.A. § 1952.

12. Criminal Law -- 1153(6)

District court's determination that several of the Government's exhibits were, absent undercover agent's testimony, adequately identified and authenticated to permit their admission was reviewable on direct appeal for abuse of discretion. Fed. Rules Evid. Rule 901(a), 28 U.S.C.A.

13. Criminal Law -- 627.8(6)

Where tape-recorded conversation between undercover agent and one defendant was identified only by agent's testimony, once agent's testimony was stricken for violation of Jencks Act, it was abuse of discretion to refuse to strike the tape recording. 18 U.S.C.A. § 8500.

14. Criminal Law -- 1134(2)

Although district court erred in striking undercover agent's testimony as violative of Jencks Act, the Court of Appeals would not consider such testimony in evaluating adequacy of identification of exhibits which were identified by the agent but which were admitted despite striking of his testimony since to permit agent's testimony to provide a foundation for exhibits would effectively deny defendants their opportunity to cross-examine the agent. 18 U.S.C.A. § 3500.

15. Criminal Law -- 627.6(5)

Undercover agent's destruction of his handwritten rough draft of investigative report pertaining to his purchase of heroin from defendant did not violate Jencks Act as the draft was not intended as the final report and draft was not similar to witness interview notes and as it was neither

intended as a final statement nor as simply a contemporaneously written factual account of what a witness said and as it was not "adopted or approved" by the agent within meaning of the Act and it was not producible. 18 U.S.C.A. §§ 3500, 3500(e)(1).

16. Criminal Law -- 1169.1(10)

Drug conspiracy convictions were reversed where reviewing court could not say that evidentiary errors, i.e., admitting several government exhibits notwithstanding striking of testimony of undercover agent who identified such exhibits, were more probably than not harmless, especially as jury was instructed that each member of a conspiracy must be held vicariously liable for acts of coconspirators committed during the course of the conspiracy so long as it was reasonably foreseeable that the acts would be performed by one or more members of the

conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.C.A. Const. Amend 5.

17. Criminal Law -- 1186.1

Although evidentiary errors required reversal of drug conspiracy conviction because of possibility of improper conviction on vicarious liability theory, defendant's conviction of distributing heroin was not also required to be reversed as distributing charge arose out of a simple sale of heroin by defendant directly to an informant and absence of evidence of involvement in the sale by any of the other defendants precluded possibility that the jury relied on a theory of vicarious liability in ruling on the distribution count. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

18. Criminal Law -- 1134(3)

Court of Appeals declined to review defendant's conviction on one count where his sentence on such count was concurrent to sentence on another count, which was affirmed, and there were no adverse collateral legal consequences flowing from the additional conviction.

19. Indictment and Information -- 124(1)

A conspiracy count can serve to link defendants in an indictment, i.e., joinder of defendants for trial purposes. Fed. Rules Cr. Proc. Rule 8(b), 18 U.S.C.A.

20. Indictment and Information -- 124(1)

Rule that a conspiracy count can serve to link defendants in an indictment, i.e., joinder of defendants for trial, may not apply if conspiracy was charged in bad faith. Fed. Rules Cr. Proc. Rule 8(b), 18 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.C.A. Const. Amend. 5.

21. Criminal Law -- 622(2)

Mere fact that Government was unable to muster its proof, without any showing of bad faith, was insufficient to establish that defendants were improperly joined for trial on drug conspiracy counts. Fed. Rules Cr. Proc. Rule 8(b), 18 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.C.A. Const. Amend. 5.

22. Criminal Law -- 620(6)

District court could not be said to have erred in denying defendant's severance motion as regards drug conspiracy counts where defendant failed to prove clear, manifest or undue prejudice from joint trial and failed to show that the jury was unable to compartmentalize the evidence. Fed. Rules Cr. Proc. Rule 14, 18 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.C.A. Const. Amend. 5.

23. Criminal Law -- 404(4)

To be admitted on count of distributing heroin, it was necessary to show that three balloons of heroin which defendant allegedly sold to a deputy sheriff were in substantially the same condition as when the crime was committed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

24. Criminal Law -- 404(4), 1153(6)

Whether heroin sought to be admitted against defendant was in substantially the same condition as when crime was committed, i.e., whenthe drug was allegedly sold to deputy sheriff, was a matter committed to the trial court and its determination would not be upset except for abuse of discretion. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

25. Criminal Law -- 404(4)

Factors to be considered in determining whether heroin sought to be admitted at trial of distribution count was in substantially the same condition as when defendant allegedly sold it to deputy sheriff included nature of the drug, circumstances surrounding its preservation and custody and likelihood of tampering by intermeddlers. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

26. Criminal Law -- 404(4)

Absent evidence of tampering or any reason to believe that heroin which defendant allegedly sold to deputy sheriff had not been properly handled, the district court, in ruling on claim of inadequate chain of custody, appeared justified in presuming that the heroin was properly mailed to the laboratory. Comprehensive

Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

27. Criminal Law -- 404(4)

Although there was a discrepancy about whether exhibit contained two or three balloons of alleged heroin, there was no abuse of discretion in admitting the balloons, as against claim of inadequate chain of custody, where at least two were positively identified by both the deputy and the chemist sufficiently to uphold the conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

28. Criminal Law -- 1169.1(10)

There was no abuse of discretion in admitting heroin exhibit, as against claim of inadequate chain of custody, where applying presumption of regularity to procedures of DEA laboratory and noting want of evidence of impropriety, gap between time heroin was mailed to the lab

and time that chemist examined it was not significant and, thus, any error in admission of exhibit prior to chemist's testimony was harmless in light thereof and also, there was no indication that taking portions of heroin by a DEA agent for testing, or possibly by the informant for use, in any way altered composition of substance ultimately analyzed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

29. Criminal Law -- 427(3)

It was not necessary that all of the independent evidence establishing drug conspiracy and defendant's relation to it be introduced before defendant's declarations could be used against codefendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 846; U.S.C.A. Const. Amend. 5.

30. Conspiracy -- 47(12)

Undercover agent's testimony that after defendant had twice sold him small quantities of heroin, once with assistance of one codefendant, a larger purchase was arranged, and evidence that such defendants together visited third defendant's house to obtain larger quantity of heroin when considered with evidence that defendant and codefendant proceeded to third defendant's tavern whereon codefendant met briefly with third defendant and that on their return defendant handed bindle of heroin to codefendant, who in turn handed it to the agent, was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant was a member of the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.C.A. Const. Amend. 5.

31. Criminal Law -- 438.1

Tape recordings of several conversations which were obtained by consent of only one party, allegedly in violation of Washington state law prohibiting recording absent consent of all parties or court order, were admissible in federal drug prosecution. 18 U.S.C.A. §§ 2511(2)(c), 2518(a)(i), 2518(10)(a)(i).

Appeal from the United States District Court for the Western District of Washington.

Before HUG and SKOPIL, Circuit Judges, and EAST*, District Judge.

Defendants appeal from judgments of conviction under various counts of a thirteen count indictment which charged conspiracy to distribute heroin, 21 U.S.C.

*Honorable William G. East, Senior United States District Judge for District of Oregon, sitting by designation.

§ 846, six counts of distribution of heroin, 21 U.S.C. §§ 841(a)(1), four counts of interstate travel to promote an unlawful activity, 18 U.S.C. §§ 1952(a)(2) and (8), and two counts of possession with intent to distribute heroin, 21 U.S.C. §§ 841(a)(1).

Defendant House's trial was severed pending determination of his competency to stand trial. The remaining five defendants were tried together, and at the close of the Government's case, the District Court granted a judgment of acquittal for defendant Kaiser[1] and an order of dismissal for defendant Acosta on their conspiracy counts. The court also entered judgments of acquittal for defendant Remsing on two distribution counts, and for defendant Kaiser on one distribution count. The jury

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[1] A judgment of acquittal was also entered on the conspiracy count with respect to one McLaury, a defendant not a party to this appeal.

convicted each defendant on all of the remaining counts. In his separate trial, defendant House was convicted on the conspiracy count and on each of the underlying substantive counts charged.

1. REMSING, SCHAFER[2], KAISER AND ACOSTA TRIAL

A. Facts

On September 5, 1979, defendant House sold two bindles of heroin to Doug Taylor, an undercover agent of the Drug Enforcement Administration (DEA) and an informant. Defendant Schafer was accompanying House that day, but was not present when the sale occurred. On September 14, 1979, House and Schafer again met with Agent Taylor and the informant. The four dicussed methods of processing and dealing drugs, and agreed to

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[2] Defendant Schafer married defendant House between the time of the indictment and trial, and was sometimes referred to as Deborah House during the trial. For clarity, we shall refer to her as Schafer.

the sale of some more heroin. Schafer delivered the heroin to Agent Taylor in the presence of the informant.

About two weeks later, House and Schafer met with Agent Taylor and the informant in Vancouver, Washington and agreed to sell a larger amount of heroin. House indicated that he would have to travel to Astoria, Oregon to get the heroin, and the four agreed to meet there. After House and Schafer arrived in Astoria, several DEA agents followed them to a residence in Ilwaco, Washington. That residence had phone service listed in defendant Remsing's name. House and Schafer then returned to Astoria and delivered a bindle of heroin to Agent Taylor.

Agent Taylor again met with House and Schafer in Vancouver, Washington on October 16, 1979. House and Schafer agreed

to sell more heroin, and traveled to Long Beach, Washington via Astoria, Oregon. While enroute, they made a phone call to a tavern owned by Remsing in Long Beach. They then went to the tavern, where Schafer was observed meeting briefly with Remsing. House and Schafer then returned to Astoria, Oregon and delivered heroin to Agent Taylor. The heroin was wrapped in a page from a magazine.

The informant testified at trial that he had been buying heroin from Remsing since 1978, but that Remsing had stopped selling to him because he owed Remsing some money. The informant made a taped call to Remsing on October 25, 1979 to set up a meeting to repay the debt and to discuss future heroin transactions. Another taped call to Remsing was made on October 30, during which the informant ordered a "spare tire," the agreed upon code word for a

bindle of heroin. The informant then went to Remsing's tavern and purchased the heroin from Remsing. This heroin was wrapped in a page from the same issue of the same magazine as that which had been previously delivered to Agent Taylor by House and Schafer.

Remsing agin met with the informant on November 19, 1979. During this conversation, which the informant taped, Remsing talked at length about how long he had been in the heroin business, the large amounts of money he had made, and his method of dealing with his supplier. He also offered to sell his connection to the informant.

In separate transactions, defendant Acosta sold three balloons of heroin to a Deputy Sheriff on September 25, 1979, and defendant Kaiser sold a bindle of heroin to the informant on September 29, 1979. At trial, the Government's efforts to tie

these defendants to each other and to Remsing were forestalled by evidentiary rulings.

B. Variance and Sufficiency of the Evidence

Remsing and Schafer contend that the evidence was insufficient to support their conspiracy convictions because the proof varied fatally from the crime charged in the indictment. They contend, therefore, that the District Court erred by refusing to grant them judgments of acquittal on that count. They argue that the Government (1) failed to prove that they were part of any conspiracy, or failed to connect Kaiser, Acosta, McLaury, and House to the conspiracy, if one existed, (2) failed to prove a conspiracy of five years duration, and (3) proved multiple conspiracies rather than the single conspiracy charged.

[1] Although we reverse the conspiracy convictions of Remsing and Schafer because

of certain evidentiary errors discussed below, we address the variance claims because they are cast in the form of allegations that the evidence was insufficient. If true, these allegations would invoke double jeopardy protections against retrial. Hudson v. Louisiana, ___U.S.___, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

In reviewing the sufficiency of the evidence to support the convictions, we must determine whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Bailey, 607 F.2d 237, 243 (9th Cir. 1979), quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original).

[2] The essential elements of conspiracy are agreement to accomplish an illegal

objective coupled with one or more overt acts in furtherance of the illegal purpose, and the requisite intent to commit the underlying substantive offense or offenses. United States v. Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980). The evidence here was sufficient to support a finding that Remsing, Schafer, and House conspired to distribute heroin, to possess it with intent to distribute, and to engage in interstate travel to promote these activities.

[3-5] The other variances alleged by Remsing and Schafer are not fatal. A variance between indictment and proof does not require reversal unless it affects the substantial rights of the parties. United States v. Durades, 607 F.2d 818, 819 (9th Cir. 1979). Such prejudice is certainly not shown every time the Government fails to connect one or more of the defendants to

a conspiracy, and this court has upheld the convictions of multiple conspirators where the convictions of some of their coconspirators have been reversed. See, e.g., United States v. Peterson, 549 F.2d 654, 657 (9th Cir. 1977). Here, the testimony pertaining to the three defendants acquitted on the conspiracy count in no way related to or implicated Schafer, Remsing or House. Without some common link between the two groups of defendants, there is no reason to assume that the defendants' substantial rights were prejudiced by a high risk of guilt transference from the members of one group to the members of another, as occurred in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), and United States v. Kenny, 645 F.2d 1323 at 1334 (9th Cir. 1981).

[6] There is no evidence here of multiple conspiracies, and thus there is no variance

with regard to the number of conspiracies charged and proven. It was, therefore, no error to refuse the requested multiple conspiracies instructions.

[7] The contention that there was a variance between the duration of the conspiracy charged and that proven is incorrect. The indictment alleged that the conspiracy began at a time unknown but "within the last five years" and continued until January 18, 1980. It did not allege that the conspiracy had lasted an entire five years.

C. Travel Act Counts

[8] Remsing and Schafer also contend that the evidence was insufficient to support their convictions on the Travel Act counts, 18 U.S.C. § 1952. The Travel Act proscribes, in part, interstate travel to promote unlawful "business enterprises" involving narcotics or controlled substances. 18 U.S.C. § 1952(a)(3) and §

1952(b)(1). The words "business enterprise" refer to a continuous course of criminal conduct rather than sporadic or casual involvement in a proscribed activity. United States v. Donaway, 447 F.2d 940, 944 (9th Cir. 1971).

[9,10] Remsing and Schafer urge that the evidence showed only isolated instances of proscribed interstate travel, not a continuous course of criminal conduct. We disagree. The statute requires only that the business enterprise be continuous, not that the interstate travel be continuous. Here, the evidence of repeated sales of heroin was sufficient to establish a continuous course of criminal conduct, the evidence was sufficient to establish that the defendants traveled across state lines four times in pursuit of their

unlawful business enterprise, thus violating the statute.

[11] We reverse Remsing and Schafer's Travel Act convictions due to the evidentiary errors discussed below, not for insufficiency of the evidence. We note, however, for the court's guidance on retrial that it was error to refuse to instruct the jury that it must find a continuous course of criminal conduct to convict defendants of the Travel Act counts.

D. Evidentiary Errors

[12,13] The testimony of Agent Taylor provided, in whole or in part, the necessary foundation for several of the Government's exhibits. His testimony was, however, stricken due to a purported violation of the Jencks Act, 18 U.S.C. § 8500. The District Court's determination that the exhibits were, absent Agent

Taylor's testimony, adequately identified and authenticated under Fed.R.Evid. 901(a) to permit their admission is reviewable for abuse of discretion. United States v. Hearst, 563 F.2d 1331, 1349 (9th Cir. 1977), cert. denied, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978). Exhibit 4, a tape recorded conversation between Agent Taylor and defendant House, was identified only by Agent Taylor's testimony. Once Agent Taylor's testimony was stricken, the District Court abused its discretion by refusing to strike exhibit 4.

Similarly, Agent Taylor's testimony was necessary to adequately identify two small bindles of heroin marked as exhibits 7 and 8. Informant Woodard's additional, extremely equivocal identifications of those exhibits were not, standing alone, sufficient to provide a proper foundation.

[14] Although we conclude that the District Court erred in striking Agent Taylor's testimony, as discussed below, we reject the Government's contention that this testimony should, therefore, be considered in evaluating the adequacy of the identifications of the exhibits. The cross-examination of Agent Taylor terminated when his testimony was stricken. To now permit his testimony to provide a foundation for exhibits would effectively deny the defendants their opportunity to cross-examine Agent Taylor, and that we cannot do. See generally, Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The District Court abused its discretion by admitting exhibits 7 and 8.

E. Jencks Act Ruling

On September 12, 1979, Agent Taylor made a handwritten draft of a report pertaining to his purchase of heroin from

defendant House on September 5. He gave the draft to his secretary for typing, made some revisions on the typewritten draft, and had it typed in final form. At the time of trial, he produced the typewritten report, but was unable to produce the original handwritten draft. The court found a violation of the Jencks Act, 18 U.S.C. § 3500, and ordered Agent Taylor's testimony stricken.

[15] We agree with the Government's contention that Agent Taylor's destruction of his handwritten rough draft of an investigative report did not constitute a violation of the Jencks Act. The Jencks Act requires, in part, that the Government produce written statements made by a witness and "signed or otherwise adopted or approved by him." 18 U.S.C. § 3500(e)(1). The draft of the report here was not intended as a final report. Nor was the

draft similar to witness interview notes which are intended only to be factual accounts of what a witness said. See United States v. Harris, 543 F.2d 1247, 1252 (9th Cir. 1976).

Although the draft here differs in some respects from surveillance notes, which were held not to be producible "statements" in United States v. Bernard, 623 F.2d 551, 557-58 (9th Cir. 1979), it was neither intended as a final statement nor as simply a contemporaneously written factual account of what a witness said. But see Harris, 543 F.2d at 1252. It was, therefore, not "adopted or approved" by Agent Taylor within the meaning of 18 U.S.C. § 3500(e)(1), and thus was not producible.

F. Consequences of Evidentiary Errors

[16] We cannot say that the evidentiary errors were more probably than not harmless, and we must, therefore, reverse the

conspiracy convictions of Schafer and Remsing. United States v. Berry, 627 F.2d 193 (9th Cir. 1980).

The jury was instructed that each member of a conspiracy may be held vicariously liable for the acts of co-conspirators committed during the course of the conspiracy, so long as it is reasonably foreseeable that the acts would be performed by one or more members of the conspiracy. Our review of the record indicates that the jury may have relied upon the vicarious liability theory in finding Remsing guilty of the distribution of heroin counts II, II, IV and VIII, and the interstate travel counts V, VII, IX and XII. Similarly, the jury may have imposed vicarious liability upon Schafer for distribution of heroin under count III, interstate travel to promote an unlawful activity under counts V, XII, IX and XIII,

and possession with intent to distribute heroin under counts VI and XI.

Our reversal of the conspiracy convictions of Remsing and Schafer precludes the imposition of vicarious liability upon them for the acts of their alleged co-conspirators. Because we cannot now be certain that the jury did not rely upon the vicarious liability theory, we must reverse the convictions of Remsing and Schafer on those counts. See Doyle v. United States, 366 F.2d 394, 400 (9th Cir. 1966).

G. Remsing's Other Convictions

[17] Remsing's conviction on count XIII for distributing heroin suffers from none of the evidentiary errors which plagued the conspiracy conviction. This charge arose out of a simple sale of heroin by Remsing directly to an informant. The absence of any evidence of involvement in this sale by any of the other defendants precludes the

possibility that the jury relied upon a theory of vicarious liability in finding Remsing guilty. Remsing's conviction on count XIII is affirmed.

[18] We decline to review Remsing's conviction on count X. "This circuit follows the concurrent sentence doctrine under which the appellate court, as a matter of discretion, may decline to review a conviction under one count if a conviction under another count is affirmed and the sentences run concurrently and no adverse collateral legal consequences for the appellant result from the additional conviction[s]." United States v. Martin, 599 F.2d 880, 887 (9th Cir.), cert. denied, 441 U.S. 962, 99 S.Ct. 2407, 60 L.Ed.2d 1067 (1979); United States v. Ford, 632 F.2d 1354, 1365, 1370 n.16 (9th Cir. 1980). Remsing's sentence on count X is concurrent to his sentence on count XIII, which we

have afirmed. We find no adverse collateral legal consequences flowing from the additional conviction.

H. Acosta and Kaiser

1. Motions for Mistrial and Severance

An order of dismissal as to defendant Acosta and a judgment of acquittal as to defendant Kaiser were entered on the conspiracy count at the close of the Government's case. In addition, Kaiser was granted a judgment of acquittal on one count of distribution of heroin. Both Kaiser and Acosta were, however, convicted of single counts of distribution of heroin.

Acosta and Kaiser moved before and during trial to be severed from the other defendants. Fed.R.Crim.P. 14. In addition, Kaiser moved following the prosecution's case for a mistrial based on improper joinder under Rule 8. Fed.R.Crim.P. 8(b). Both defendants here claim that the

District Court erred in denying these motions.

Acosta does not appear to raise any significant claim of prejudice concerning count VIII, the substantive charge upon which he was convicted. Because his arguments relate to the conspiracy count, on which he was acquitted, his claim of error on the severance issue is rejected.

Kaiser claims that he was improperly joined with the other defendants under Rule 8(b), and that even if the initial joinder was correct, being tried jointly prejudiced him to such an extent that it was error not to grant his Rule 14 motion for severance.

[19-21] A conspiracy count can serve to link defendants in an indictment. United States v. Valenzuela, 596 F.2d 824, 829 (9th Cir.), cert. denied, 441 U.S. 965, 99 S.Ct. 2415, 60 L.Ed.2d 1071 (1979). This ruly may not apply, however, if the conspiracy was charged in bad faith. Id.;

Donaway, 447 F.2d at 943. Here, Kaiser offers no support for his claim of bad faith other than the directed verdict on the conspiracy count. With only his bare assertions here Kaiser has not established more than that the Government was unable to muster its proof.

[22] We also reject Kaiser's contention that the District Court erred in denying his Rule 14 severance motion. Kaiser has failed to meet his burden of proving "clear," "manifest," or "undue" prejudice from the joint trial, and he has similarly failed to show that the jury was unable to compartmentalize the evidence. United States v. Escalante, 637 F.2d 1197, at 1200-1201 (9th Cir. 1980) (modified in other respects August 27, 1980); and Donaway, 447 F.2d 940.

2. Chain of Custody Claims

Kaiser and Acosta were each convicted of only one count of distribution of

heroin. Acosta contends that his conviction must be reversed because there was an inadequate chain of custody established for an exhibit consisting of balloons of heroin admitted against him.

[23-25] In order to be admitted, the heroin must be shown to be in substantially the same condition as when the crime was committed. This determination is committed to the trial court, and will not be upset except for an abuse of discretion. Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960). Factors to be considered include "the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." Id.

[26,27] Here, there is no evidence of any tampering nor any reason to believe that the heroin was not properly handled. The District Court thus appears justified

in presuming that the heroin was properly mailed to the lab. And although there is a discrepancy about whether the exhibit contains two or three balloons, at least two were positively identified by both the deputy and the chemist sufficiently to uphold the conviction. There is no abuse of discretion, and this assignment of error by Acosta is rejected. Cf. United States v. Christopher, 488 F.2d 849 (9th Cir. 1973) (heroin exhibits admitted when initialed by agent and chemist).

[28] Similarly without merit is Kaiser's contention that an inadequate chain of custody was established to permit the introduction of a heroin exhibit against him. Applying the presumption of regularity to the procedures of the DEA laboratory, and noting that there is no evidence of impropriety, the gap between the time the heroin was mailed to the lab and the

time that the chemist examined it is not significant. Gallego, 276 F.2d at 917. Any error in the admission of the exhibit prior to the chemist's testimony is harmless in light of that testimony. Finally, there is no indication that the taking of portions of the heroin by a DEA agent for testing, or possibly by the informant for use, in any way altered the composition of the substance ultimately analyzed by the chemist. There was no abuse of discretion by the District Court in admitting this exhibit.

II. THE HOUSE TRIAL

A. Facts

The facts adduced at the House trial were essentially the same as those established at the trial of the other defendants, except that no evidence pertaining to Kaiser, Acosta, or McLaury was introduced and Agent Taylor was permitted to testify.

B. Hearsay Objections

House contends that there was not the required independent, sufficient, substantial evidence to establish the exfistence of a conspiracy and Remsing's connection to it, and that it was, therefore, error to admit evidence of certain statements made by Remsing under the declarations of coconspirators exception to the hearsay rule. United States v. Weiner, 578 F.2d 757, 768 (9th Cir.), cert. denied, 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d 651 (1978).

[29] We disagree. It was not necessary that all of the independent evidence establishing the conspiracy and Remsing's relation to it be introduced before Remsing's declarations could be used against House. See, e.g., United States v. Di Rodio, 565 F.2d 573, 576 (9th Cir. 1977). Here, the independent evidence of

the existence of a conspiracy and Remsing's connection to it was sufficient and substantial enough to permit the introduction of Remsing's declarations.

C. Sufficiency of Evidence

House contends that the evidence, at most, ultimately proved only a conspiracy between House and Schafer, and that the Government thus failed to prove the Remsing, Schafer, House conspiracy alleged.

The evidence, however, indicates active participation by House in the conspiracy. Agent Taylor testified that after House had twice sold him small quantities of heroin, once with the assistance of Schafer, a larger purchase was arranged. House told Agent Taylor that he would have to travel to Astoria to obtain the larger quantity of heroin because his supplier lived in the area. House and Schafer together visited Remsing's house on

that trip, and returned to Astoria with the heroin.

The Government also introduced a tape recording of a conversation between Agent Taylor and House in which House agreed to supply another large quantity of heroin. House and Schafer then met with Agent Taylor in Astoria, and then proceeded to Remsing's tavern in Long Beach, Washington, where Schafer met briefly with Remsing while House had a drink. Upon their return to Astoria, House handed a bindle of heroin to Schafer who in turn handed it to Agent Taylor.

[30] We hold that this evidence is sufficient to permit a rational trier of fact to find beyond a reasonable doubt that House was a member of the conspiracy. United States v. Bailey.

D. Tape Recordings

House argues that the District Court should have suppressed recordings of

several conversations which were obtained with the consent of only one party. He contends that they were made in violation of Washington state law prohibiting recordings absent consent of all parties or a court order and were, therefore, required to be excluded under 18 U.S.C. § 2518(10)(a)(i) (codifying exclusionary rule for communications "unlawfully intercepted"). [31] House's contention has been rejected by this circuit in the context of this same Washington statute. United States v. Zemek, 634 F.2d 1159, 1164 n.4 (9th Cir. 1980); United States v. Keen, 508 F.2d 986 (9th Cir. 1974), cert. denied, 421 U.S. 929, 95 S.Ct. 1655, 44 L.Ed.2d 86 (1975). In Keen, the court held that "wiretap evidence obtained in violation of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law." Keen, 508 F.2d at 989.

House argues that Keen is not applicable here because that case did not discuss the exclusionary provisions of § 2518(10)(a)(i).

Title 18 U.S.C. § 2511(2)(c) provides:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

The interception is therefore not unlawful under 18 U.S.C. § 2518(10)(a)(i), which is a part of the same chapter. Thus the discussion of the non-applicability of the exclusionary rule to the wiretap evidence in Keen applies as well to this case.

III. CONCLUSION

The convictions of Remsing on counts X and XIII are affirmed. His convictions on counts I, II, III, V, VII, IX and XII are reversed. Schafer's convictions are

all reversed. Kaiser's conviction on count VIII is affirmed, as is Acosta's conviction on count IV. House's convictions on counts I, II, III, V, VI, VII, IX, XI and XII are affirmed.

AFFIRMED IN PART, REVERSED IN PART.